ICLG

The International Comparative Legal Guide to:

Class & Group Actions 2016

8th Edition

A practical cross-border insight into class and group actions work

Published by Global Legal Group, in association with CDR, with contributions from:

Advokatfirman Vinge KB
Anderson Mōri & Tomotsune
Arnold & Porter (UK) LLP
Ashurst
August & Debouzy
Clayton Utz
Cliffe Dekker Hofmeyr
Clifford Chance
De Brauw Blackstone Westbroek N.V.
Debarliev, Dameski & Kelesoska Attorneys at Law
Eversheds Ltd.
Fiebinger Polak Leon & Partner Rechtsanwälte GmbH
Gandolfo Law LLC
Gardere, Arena y Asociados, S.C.
Gowling Lafleur Henderson LLP
Kubas Kos Gałkowski
Linklaters LLP
Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados
Norton Rose Fulbright
Pachiu & Associates
Quinn Emanuel Urquhart & Sullivan, LLP
Russell McVeagh
Sidley Austin LLP
Zunzunegui Abogados

CDR Commercial Dispute Resolution
GLG Global Legal Group

GLG
Global Legal Group

Contributing Editors
Ian Dodds-Smith & Alison Brown, Arnold & Porter (UK) LLP

Head of Business Development
Dror Levy

Sales Director
Florjan Osmani

Account Directors
Oliver Smith, Rory Smith

Senior Account Manager
Maria Lopez

Sales Support Manager
Toni Hayward

Editors
Rachel Williams
Caroline Collingwood

Senior Editor
Suzie Levy

Group Consulting Editor
Alan Falach

Group Publisher
Richard Firth

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd.
October 2015

ISBN 978-1-910083-67-3
ISSN 1757-2797

Strategic Partners

General Chapters:

Country Question and Answer Chapters:

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Class Action Settlement Standards and Issue Certification Update

Elizabeth M. Chiarello

Daniel A. Spira

Sidley Austin LLP

Introduction

Courts are taking a closer look at settlements in class actions, and a number of recent decisions also address the feasibility of issue certification under Federal Rule of Civil Procedure 23(c)(4). This chapter will address recent developments in both of these areas.

With respect to individual settlements in class actions, some defendants have offered named plaintiffs full relief in order to moot their lawsuits, under the theory that a plaintiff lacks Article III standing where she has been offered everything she hopes to recover in her case. The federal courts of appeals have been divided on whether an unaccepted offer of full relief moots a named plaintiff's claim, with one court of appeals recently reversing its position. The Supreme Court has granted *certiorari* in a case in which it may decide the issue next term.

Classwide settlements also have received increased scrutiny. Class settlements require court approval, and courts may approve a class settlement only after finding that "it is fair, reasonable, and adequate". Fed. R. Civ. P. 23(e)(2). The meaning of "fair, reasonable, and adequate" differs depending on the nature of the case and jurisdiction, but recent decisions from the United States Court of Appeals for the Seventh Circuit attempt to set guideposts for certain aspects of class settlements, including the ratio of class benefits to counsel fees, use of *cy pres*, and claims procedures.

On the litigation front, the boundaries of "issue class certification" have received more attention in the last year. Traditionally, class certification is granted or denied with regard to entire causes of action. Rule 23(c)(4) departs from that practice, permitting certification with respect to "particular issues". Courts have grappled with the appropriate application of Rule 23(c)(4), resulting in divergent views and inconsistent case law.

This chapter outlines the current landscape for settling claims in class actions – both on an individual and classwide basis – and examines recent case law regarding issue certification under Rule 23(c)(4). Because of the attention these topics are receiving, the Rule 23 Subcommittee of the Civil Rules Advisory Committee on the Federal Rules of Civil Procedure ("Subcommittee") has proposed "conceptual sketches" of changes to Rule 23 that address settlement and issue certification, and this chapter identifies and discusses those proposed changes as well.[1]

Individual Settlements in Class Actions

One of the first questions defence counsel confronts in a class action is whether to make an offer of full relief under Rule 68, which may moot the class action. Most courts have applied the "relation back" doctrine to hold that an unaccepted Rule 68 offer does not moot a class action, provided that the named plaintiff files a motion for class certification in a timely manner. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1096 (9th Cir. 2011) ("where a defendant makes an unaccepted Rule 68 offer of judgment that fully satisfies a named plaintiff's individual claim before the named plaintiff files a motion for class certification, the offer does not moot the case so long as the named plaintiff may still file a timely motion for class certification"); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1250 (10th Cir. 2011) ("a named plaintiff in a proposed class action for monetary relief may proceed to seek timely class certification where an unaccepted offer of judgment is tendered in satisfaction of the plaintiff's individual claim before the court can reasonably be expected to rule on the class certification motion"); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 921 (5th Cir. 2008) (if a court grants a motion to certify a class, the offer of full relief "would not fully satisfy the claims of everyone in the collective action", whereas "if the court denies the motion to certify, then the Rule 68 offer of judgment renders the individual plaintiff's claims moot"); and *Weiss v. Regal Collections*, 385 F.3d 337, 348 (3d Cir. 2004) ("Absent undue delay in filing a motion for class certification, therefore, where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint"). Courts reason that a determination on class certification "relates back" to the filing of the original complaint, before the Rule 68 offer was made, so that the class certification decision precedes – and therefore is not mooted by – a Rule 68 offer. *See, e.g., Weiss*, 385 F.3d at 348.

The Seventh Circuit had, until recently, disagreed, and held that if a named plaintiff receives an offer for full relief prior to moving for class certification, the court lacks standing and the case is moot. *See Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011). *See also Barber v. Am. Airlines, Inc.*, 948 N.E.2d 1042 (Ill. 2011) (applying the same rule as the Seventh Circuit). This led plaintiffs to begin filing placeholder motions for class certification at the same time as their complaints, and courts to stay such motions while plaintiffs conducted discovery relevant to class certification.

In an August 6, 2015 decision, however, the Seventh Circuit reversed itself. In *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878, at *3 (7th Cir. Aug. 6, 2015), the Seventh Circuit held that a defendant's unaccepted offer of full relief in a Telephone Consumer Protection Act ("TCPA") case did not moot the individual plaintiff's claims, expressly overruling its prior decisions in *Damasco, Thorogood v. Sears, Roebuck & Co.*, 595 F.3d 750 (7th Cir. 2010) and *Rand v. Monsanto Co.*, 926 F.2d 596

(7th Cir. 1991), "to the extent they [held] that a defendant's offer of full compensation moots the litigation or otherwise ends the Article III case or controversy".

The question of whether a putative collective action becomes moot when the sole plaintiff receives a complete offer of relief appeared to be presented in a recent case in the United States Supreme Court: *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). It was Justice Kagan's dissent, however, not the majority opinion, that confronted the question. *Id*. at 1528-29 ("While the Courts of Appeals disagree whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot, we do not reach this question, or resolve the split, because the issue is not properly before us"). Justice Kagan asserted that a plaintiff's rejection of a full offer of relief does not moot her claim, adding "a friendly suggestion to the Third Circuit: Rethink your mootness-by-unaccepted-offer theory. And a note to all other courts of appeals: Don't try this at home". *Id*. at 1534.

In May 2015, in another TCPA class action, the Supreme Court granted *certiorari* on the following two questions: "(1) Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim; [and] (2) whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified". *Gomez v. Campbell-Ewald Co.*, 768 F.3d 871 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2311 (2015). Thus, the Supreme Court may soon clarify whether Justice Kagan's dissent in *Genesis Healthcare* represents the majority view. If so, defendants will be unable to moot named plaintiffs' and class members' claims through early offers of judgment.

Class Action Settlements

Over the last year, courts have authored decisions that are increasingly critical of class action settlements, particularly those in consumer class actions. *Eubank v. Pella Corp.*, 753 F.3d 718 (7th Cir. 2014), *Redman v. RadioShack Corp.*, 768 F.3d 622 (7th Cir. 2014), and *Pearson v. NBTY, Inc.*, 722 F.3d 778 (7th Cir. 2015) are three recent examples.

Plaintiffs in *Eubank* brought a class action over allegedly defective windows. 753 F.3d at 721. After seven years of litigation, the district court granted final approval of a class settlement, valuing class relief at $90 million and approving an $11 million attorneys' fee award. *Id.* at 723. The Seventh Circuit reversed, finding several aspects of the settlement problematic. First, the court found that the settlement was "scandalous", primarily because the lead class counsel was the plaintiff's son-in-law and was involved in recent disciplinary proceedings alleging misconduct, and the plaintiff's daughter was a partner in the lead counsel's firm. *Id*. at 721-22. Second, the court believed that the claims process discouraged claims because the claim form and notice were long and complicated. *Id*. at 725-26 (claim "forms require a claimant to submit a slew of arcane data ... and are so complicated that Pella could reject many of them on the ground that the claimant had not filled out the form completely and correctly"). Third, the court held that the attorneys' fee award was based on an inflated value of relief to the class, and when properly considered, the fee request constituted 56% of the value of relief to the class. *Id*. at 727. This ratio was excessive, according to the Seventh Circuit, particularly because there was a "reverter" clause, under which any money not awarded as attorneys' fees would not benefit the class but would "revert" back to the defendant. *Id*. at 723 ("Still another questionable provision of the settlement, which the judge refused to delete, made any reduction in the $11 million attorneys' fee award revert to Pella, rather than being added to the compensation of the class members"). When *Eubank* was decided, some commentators questioned whether the Seventh Circuit would have been as critical of the settlement if the conflict issues regarding the plaintiff's counsel were not present.

Then came *Redman*, which was brought under the Fair and Accurate Credit Transactions Act, which prohibits the display of credit and debit card expiration dates on receipts provided at the point of sale. 768 F.3d at 626. Under the terms of the settlement, class members who submitted a claim could receive a $10 coupon. *Id*. at 628. The district court approved the settlement valued at $4.1 million ($830,000 in claims ($10/claim for 83,000 claimants), $1 million in attorneys' fees, and $2.2 million in administrative costs). *Id*. at 628-29. Again, the Seventh Circuit reversed. *Id*. at 640. The court held that (i) notice and administration costs should not be included in calculating the overall benefit to the class, and (ii) the reasonableness of attorneys' fees depends on what the class members actually received (as opposed to what was made available). *Id*. at 630 ("the ratio that is relevant to assessing the reasonableness of the attorneys' fee that the parties agreed to is the ratio of (1) the fee to (2) the fee plus what the class members received" and "the roughly $2.2 million in administrative costs should not have been included in calculating the division of the spoils between class counsel and class members", as such "costs are part of the settlement but not part of the value received from the settlement by the members of the class"). After eliminating notice and administration costs, the fees ($1 million) were more than the relief the class received ($830,000), which itself may have been inflated because that assumed all coupons were redeemed. *Id.* at 630. The court offered alternative "possible solutions" in situations where "the agreed-upon attorneys' fee is grossly disproportionate to the award of damages to the class", such as:

> to increase the share of the settlement received by the class, at the expense of class counsel. Another possible solution is to jack up the award of damages, in this case for example from $830,000 to $2 million (cash, not coupons), while leaving the fee award at $1 million. The administrative costs might also be increased, specifically by increasing the number of class members notified of the settlement, in order to give more class members a slice of the pie. The total cost of the settlement might rise from $4.1 million to say $6 million. *Id.* at 632.

Finally, the court noted a disfavour for "clear sailing" provisions, under which defence counsel agree not to contest the fee request up to a certain percentage or amount. *Id*. at 637. After *Redman*, commentators questioned whether the Seventh Circuit was critical of the settlement in *Redman* because the only compensation to class members was coupons, or whether the seemingly heightened scrutiny would apply to non-coupon settlements as well.

In *Pearson*, plaintiffs sued over allegedly deceptive labelling of glucosamine dietary supplements. 772 F.3d at 779. The district court approved a settlement that, after claims were made, ultimately provided for $1.93 million in attorneys' fees, $1.5 million in administration costs, $1.13 million to *cy pres*, $865,284 to the class members, $30,000 total to the six named plaintiffs, and an injunction that would bar the defendants from making certain representations on their labels for a defined period. *Id*. at 780. The Seventh Circuit reversed yet again, *id*. at 787, even though *Pearson* did not present conflict of interest issues (like *Eubank*) and was not a coupon settlement (like *Redman*). The court criticised the district court's valuation of the settlement (and therefore the amount of attorneys' fees) at the "maximum potential" of what class members could receive, rather than what the class actually received. *Id*. at 780-81. In addition to reiterating that notice and administration costs should not be counted as benefits to the class, the court held that *cy pres*

and the injunctive relief were also not benefits to the class because neither benefitted past purchasers. *Id.* at 781, 784. The court therefore found that the attorneys' fee award of $1.93 million was disproportionate to the approximately $900,000 the class received, particularly because the settlement included a reverter. *Id.* at 782, 786. In consumer class actions, the presumption the court suggested is "that attorneys' fees awarded to class counsel should not exceed a third or at most a half of the total amount of money going to class members and their counsel". *Id*. at 782. Finally, the court took issue with the claims process, as in *Pella*, suggesting that the requirements "discourage[ed the] filing" of claims. *Id*. at 781. Although a class member would likely have to comply with similar requirements for making claims after a trial, the court did not address why proof that would be required at trial was too onerous for a settlement.

In sum, negotiating a class settlement under the law of the Seventh Circuit requires counsel to consider: (1) the value of the benefit to the class without injunctive relief, *cy pres*, and notice and administrative costs, and the ratio of attorneys' fees to the class benefits; (2) whether reverter and clear sailing provisions are worthwhile, and if so, whether there are ways to demonstrate the good faith nature of the settlement and avoid the misconstrued appearance of collusion the Seventh Circuit believes such provisions create; and (3) the simplicity of claim forms and notice. What remains to be seen is what the court will do with a settlement that contains a reverter and clear sailing agreement but in which the attorneys' fees are an appropriate percentage of the actual benefits to class members. Also, given the traditionally low claims rates in consumer class action settlements, it remains to be seen how a settlement can satisfy the goals of providing sufficient compensation to class members and appropriate compensation for class counsel without leaving too much to *cy pres* or creating a windfall for class members. At a minimum, the court's comments reflect that class counsel should not invest significant time in cases on the mere expectation that they can recover significant fees in a class settlement. *See RadioShack*, 768 F.3d at 633 ("[A]ttorneys' fees don't ride an escalator called risk into the financial stratosphere. Some cases should not be brought, because the litigation costs will exceed the stakes, and others are such long shots that prudent counsel will cut his expenditure in litigating them of time, effort, and money to the bone").

Other courts are taking note of the Seventh Circuit's views on class action settlements. In particular, courts have cited Seventh Circuit precedent to hold that *cy pres* distributions are not benefits to the class[2]; hold that administration fees are not a benefit to the class and should not be considered in determining reasonable attorneys' fees[3]; and question the ratio of attorneys' fees to class benefits.[4] Objectors, too, are citing the Seventh Circuit's decisions to challenge other settlements around the country. In April 2015, in *Careathers v. Red Bull, N.A., Inc.*, No. 1:13-cv-0369 (S.D.N.Y.), Theodore Frank, of the Center for Class Action Fairness – a frequent objector in class action settlements – relied on, *inter alia*, the Seventh Circuit's recent jurisprudence regarding settlements to challenge the inclusion of a clear sailing agreement and the size of the fee request in Red Bull's proposed class settlement.

Recognising the increased scrutiny that class settlements are receiving, the Subcommittee considering revisions to Rule 23 offered several conceptual sketches to address them. In particular, the Subcommittee has proposed to: (1) create one uniform standard that all federal courts would consider in determining whether a settlement is "fair, adequate, and reasonable" (to eliminate intra-circuit differences in such standards) (Conceptual Sketch 1); (2) remove the predominance requirement when certification is sought for settlement purposes only (Conceptual Sketch 2); (3) codify the standards for approving use of *cy pres* in class settlements (Conceptual Sketch 3); and (4) impose (a) a "reporting obligation for objectors", which would require an objector to disclose any agreement made in exchange for withdrawing his objection (to discourage "professional objectors" from trying to profit from a settlement), and (b) sanctions for frivolous objections (Conceptual Sketch 4). *See* Subcommittee Report, at 243.

Issue Certification

Federal Rule 23(c)(4) provides that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues". But Rule 23 itself provides little guidance on when (c)(4) certification is, in fact, "appropriate", and, as more plaintiffs seek "issue certification", courts have differed in their approaches to Rule 23(c)(4).

The Relationship Between Rules 23(b)(3) and 23(c)(4)

When considering 23(c)(4) certification, courts have disagreed over the role of Rule 23(b)(3), which requires that "questions of law or fact common to class members predominate over any questions affecting only individual members". We first explain how courts have historically addressed the relationship between Rules 23(b)(3) and (c)(4), and then discuss recent approaches.

In *Castano v. American Tobacco Company*, the Fifth Circuit considered a district court's certification of issues of "core liability" and "punitive damages" under Rule 23(c)(4), leaving open for another day individualised questions of injury-in-fact, proximate cause, reliance, affirmative defences, and compensatory damages. 84 F.3d 734, 739 (5th Cir. 1996). The district court held that predominance was satisfied with regard to the issue classes, but did not analyse whether common issues predominated with respect to the underlying causes of action. *Id*. The Fifth Circuit reversed, holding, *inter alia*, that "[t]he proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, ***as a whole***, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial". *Id.* at 745 n.21 (emphasis added). The court reasoned that "allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of Rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended". *Id.*

In *In re Nassau County Strip Search Cases*, the Second Circuit disagreed. 461 F.3d 219 (2d Cir. 2006). Rejecting *Castano*, the court held that it "may employ subsection (c)(4) to certify a class as to liability regardless of whether the claim as a whole satisfies Rule 23(b)(3)'s predominance requirement". *Id*. at 227. To hold otherwise would mean that "a court could only use subsection (c)(4) to manage cases that the court had already determined would be manageable *without* consideration of subsection (c)(4)". *Id.* (emphasis in original; quotations omitted). Other courts have recently followed the Second Circuit's reasoning. *See, e.g., Morris v. Davita Healthcare Partners, Inc.*, No. 13-cv-00573, 2015 WL 3814361, at *10 (D. Colo. June 18, 2015) ("consider[ing] only the issues on which plaintiffs seek 23(c)(4) certification in analyzing whether questions of law or fact common to class members predominate over any questions affecting only individual members"); and *Parker v. Asbestos Processing, LLC*, No. 0:11-cv-01800, 2015 WL 127930, at *11 (D.S.C. Jan. 8, 2015) ("this Court holds that it may use Rule 23(c)(4) to certify a class as to an issue regardless of whether the claim as a whole satisfies the predominance test in Rule 23(b)(3)").

The Third Circuit, on the other hand, has declined to "join[] either camp in the circuit disagreement …". *Gates v. Rohm & Haas Co.*, 655 F.3d 255, 273 (3d Cir. 2011). Instead, it has set forth a "non-exclusive list of factors" to "guide courts as they apply" Rule 23(c)

(4), noting that courts "should … explain how class resolution of the issue(s) will fairly and efficiently advance the resolution of class members' claims, including resolution of remaining issues". *Id*.

In an effort to resolve this split and promote uniformity, the Subcommittee has offered a conceptual sketch that would "[c]larify that predominance is not a prerequisite to 23(c)(4) certification", siding with the approach taken by the Second Circuit and other courts in recent opinions. *See* Subcommittee Report, at 281.

Issue Certification Following Comcast

In *Comcast Corp. v. Behrend*, the Supreme Court reversed Rule 23(b)(3) certification of plaintiffs' antitrust claims, reasoning that the plaintiffs' proposed damages model "falls far short of establishing that damages are capable of measurement on a classwide basis… Questions of individual damage calculations will inevitably overwhelm questions common to the class". 133 S. Ct. 1426, 1433 (2013).

While *Comcast* did not address issue class certification, it has nonetheless affected plaintiffs' efforts to invoke Rule 23(c)(4). As some in the defence bar have noted, "[t]he use of issue certification under Rule 23(c)(4) has experienced a resurgence in the last two years as a means of attempting to circumvent the Supreme Court's opinion in *Comcast Corp. v. Behrend*". Lawyers for Civil Justice, Comment to the Advisory Committee on Civil Rules and its Rule 23 Subcommittee (Apr. 7, 2015) (available at www.uscourts.gov/file/17968/download) ("LCJ Comment"), at 6-7. Specifically, plaintiffs have sought certification of issue classes pertaining only to liability, deferring the potentially individualised damages issues highlighted by *Comcast* for future proceedings. But if that were permissible, one might wonder why the Supreme Court did not affirm certification of a liability class in *Comcast*.

In *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, the district court certified a liability-only issue class of consumers who claimed their washing machines were defective. 722 F.3d 838, 844 (6th Cir. 2013). After the Sixth Circuit affirmed certification, the Supreme Court vacated and ordered reconsideration in light of *Comcast*. *Id*. at 845. The Sixth Circuit again affirmed:

> Here the district court certified only a liability class and reserved all issues concerning damages for individual determination; in *Comcast Corp*. the court certified a class to determine both liability and damages. When determinations on liability and damages have been bifurcated, *see* Fed. R. Civ. P. 23(c)(4), the decision in *Comcast* – to reject certification of a liability and damages class because plaintiffs failed to establish that damages could be measured on a classwide basis – has limited application. *Id.* at 860, *cert. denied* 134 S. Ct. 1277 (2014).

Butler v. Sears, Roebuck & Co. similarly involved a liability-only class of consumers who sued a washing machine manufacturer. After the Seventh Circuit reversed the Northern District of Illinois' denial of certification, the Supreme Court remanded for reconsideration in light of *Comcast*. 727 F.3d 796, 797 (7th Cir. 2013). Like the Sixth Circuit, the Seventh Circuit held on remand that:

> [T]he district court in our case, unlike *Comcast*, neither was asked to decide nor did decide whether to determine damages on a class-wide basis…. [A] class action limited to determining liability on a class-wide basis, with separate hearings to determine – if liability is established – the damages of individual class members, or homogenous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed. *Id*. at 800, *cert. denied* 134, S. Ct. 1277 (2014).

Other courts have taken a more demanding approach. In *Rahman v. Mott's LLP*, the Northern District of California recognised that "[i]n the wake of *Comcast*, a number of other circuits have held that a liability-only class may be certified even in the absence of a showing of predominance on the issue of damages", No. 13-cv-03482, 2014 WL 6815779, at *8 (N.D. Cal. Dec. 3, 2014), but nonetheless denied certification:

> Rahman has failed to articulate why a bifurcated proceeding would be more efficient or desirable…. Should [plaintiff] prevail on the issue of liability, certifying a second class on the issue of damages would in essence amount to prosecuting two trials when one would have done just as well. Alternatively, allowing myriad individual damages claims to go forward hardly seems like a reasonable or efficient alternative …. *Id*. at *9.

See also, e.g., Saavedra v. Eli Lilly & Co., No. 2:12-cv-9366, 2014 WL 7338930, at *10 (C.D. Cal. Dec. 18, 2014) ("Plaintiffs fail to show that damages can be determined even on an individual basis once liability is decided. Thus certification of an issue class would not advance the resolution of this litigation"); and *Franco v. Conn. Gen. Life Ins. Co.*, 299 F.R.D. 417, 433-34 (D.N.J. 2014) ("issue certification, as permitted by Rule 23(c)(4), would not advance the resolution of the claims, and thus this action does not warrant exercise of the Court's discretion to certify certain issues").

The Interplay of Issue Certification and Class Settlement Decisions

Given the reality that most certified class actions are resolved through settlement rather than trial, a lenient approach to certification of 23(c)(4) issue classes despite non-certifiable individualised issues could have a profound impact on class action practice by giving plaintiffs additional leverage from which to approach settlement negotiations.

On the other hand, in response to the Subcommittee's proposed elimination of predominance from Rule 23(c)(4), members of the defence bar have asked how parties can "settle a class action certified for liability only? … If the class was certified under Rule 23(c)(4) because it could not meet the predominance requirement [as to the entire cause of action], how can it be certified for settlement?"[5] *See* LCJ Comment, at 8. After all, it is the payment to class members that is the goal of a class settlement. Further, "[h]ow will the court determine attorneys' fees in the absence of any monetary award", particularly given the increased scrutiny afforded to fee requests described above? *See id*.

Resolution of these questions regarding settlement may significantly affect whether or not plaintiffs will continue to push for certification of issue classes, or whether motions for class certification will remain rooted in Rule 23(b).

Conclusion

Recent decisions regarding settlements in class actions have had and will continue to have an effect on settlement negotiations in federal courts across the country. We will likely soon have guidance from the Supreme Court regarding the effect of offering full relief to a named plaintiff in a class action, but the landscape for settling cases on a classwide basis continues to change. Courts want to see fair settlements with simple procedures that maximise compensation to the class and not class counsel or third parties. The Rule 23 Subcommittee is attempting to ease the path to settlement for all parties, but the language of proposed amendments and their effect remains to be seen. With respect to issue classes, *Comcast* appears to have increased plaintiffs' requests for Rule 23(c)(4) certification, but the willingness of courts to bifurcate liability or other issues from damages continues to evolve as they consider whether such measures will materially advance efficient litigation.

Endnotes

1. The Subcommittee stated that the conceptual sketches "are not intended as initial drafts of actual rule change proposals, and should not be taken as such", and it has an "array of questions" to address before it proposes any actual rule changes. *See* Rule 23 Subcommittee Report, available at http://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-rules-civil-procedure-april-2015 ("Subcommittee Report") (last visited Aug. 18, 2015), at 244.
2. *In re Pool Prods. Distrib. Mkt. Antitrust Litig.*, MDL No. 2328, 2015 WL 4528880, at *16 (E.D. La. July 27, 2015) (taking a "middle" approach to *cy pres* by "discounting the *cy pres* award's monetary value to account for the indirect benefit provided to the class").
3. *Myles v. AlliedBurton Sec. Servs.*, LLC, No. 12-cv-05761, 2014 WL 6065602, at *5 (N.D. Cal Nov. 12, 2014).
4. *Tait v. BSH Home Appliances Corp.*, No. SACV 10-0711, 2015 WL 4537463, at *14 (C.D. Cal. July 27, 2015) (recognising that a ratio of $4 million in attorneys' fees to $1 million in class relief was at odds with Seventh Circuit precedent, but ultimately awarding the full fees requested because the litigation was hotly contested for more than five years).
5. In addition to requiring that a class settlement be "fair, adequate, and reasonable", Rule 23(e) only permits courts to approve the settlement of a "*certified* class …" (emphasis added).

Elizabeth M. Chiarello
Sidley Austin LLP
One South Dearborn
Chicago, IL 60603
USA

Tel: +1 312 853 0640
Email: echiarello@sidley.com
URL: www.sidley.com

Elizabeth M. Chiarello is a partner in Sidley Austin's Chicago office, focusing on the defence of companies in class action, products liability and mass tort, and other complex litigation matters. Beth has successfully defended class actions on behalf of Fortune 500 companies in a variety of industries, including clients in the electronics, financial services, transportation, cosmetics, food, nutritional supplements, pharmaceutical, and medical device industries. Beth has extensive experience with multi-district litigation and has served as national coordinating counsel in a variety of putative nationwide class actions filed in federal and state courts across the country. In 2015, The Legal 500 US recommended Beth in the categories of Product Liability and Mass Tort defence: Automotive/Transport, as well as in Consumer Products. Prior to joining Sidley, Beth clerked for United States Court of Appeals for the Seventh Circuit.

Daniel A. Spira
Sidley Austin LLP
One South Dearborn
Chicago, IL 60603
USA

Tel: +1 312 853 7274
Email: dspira@sidley.com
URL: www.sidley.com

Daniel A. Spira is an associate in Sidley Austin's Chicago office, and focuses his practice on the defence of product liability cases and consumer class actions. In both state and federal trial and appellate courts, Dan has represented clients in a wide array of industries, including pharmaceuticals, nutritional supplements, food and beverages, construction products, automotives, and consumer goods. He has extensive experience writing and arguing successful motions at various stages of litigation, taking and defending depositions, managing complex discovery, and assisting clients reach favourable settlements ranging from single plaintiffs to nationwide classes.

SIDLEY AUSTIN LLP
SIDLEY

Sidley Austin LLP is a premier law firm with a practice highly attuned to the ever-changing international landscape. The firm has built a reputation for being an adviser for global business, with 1,900 lawyers in 19 offices worldwide. Sidley maintains a commitment to providing quality legal services and to offering advice in litigation, transactional and regulatory matters spanning virtually every area of law. The firm's lawyers have wide-reaching legal backgrounds and are dedicated to teamwork, collaboration and superior client service.

Current titles in the ICLG series include:

- Alternative Investment Funds
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Recovery & Insolvency
- Corporate Tax
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks

GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk